UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

HAYNES BUILDING SERVICES, LLP.

and

CASE 31-CA-093920

J. TADEO GOMEZ-FLORES,

An Individual

Nicole Pereira, Esq., for the General Counsel.
Jeffrey P. Fuchsman, Esq. (Ballard, Rosenberg, Golper & Savitt), of Glendale, California, for the Respondent.
Ari E. Moss, Esq., of Sherman Oaks, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Based on the parties' stipulated record, I conclude that the Respondent violated Section 8(a)(1) of the Act by including, in a notice to job applicants, language that applicants reasonably would understand to preclude them from filing unfair labor practices with the National Labor Relations Board. However, I recommend that the Board dismiss allegations that Respondent violated the Act by requiring employees to sign an "Agreement for Arbitrating Disputes" and enforcing it in a manner which excluded class actions

Procedural History

This case began on November 28, 2012, when the Charging Party, J. Tadeo Gomez-Flores, filed an unfair labor practice charge against the Respondent, Haynes Building Services, LLP. Region 31 of the National Labor Relations Board docketed the charge as Case 31–CA–093920. On January 15, 2013, the Charging Party amended this charge.

On June 27, 2013, after an investigation, the Regional Director for Region 31, acting with authority delegated by the Board's General Counsel, issued a complaint against the Respondent. On July 3, 2013, the General Counsel issued a corrected complaint. (For brevity, the corrected complaint will be referred to simply as the "complaint.") Respondent filed a timely answer.

On November 14, 2013, the Respondent and the Charging Party, by counsel, executed a joint motion to transfer proceedings to the Division of Judges and stipulation of facts. On November 15, 2013, counsel for the General Counsel executed this same document. There, the parties expressly waived a hearing before an administrative law judge, submitted the matter directly to the Division of Judges for decision, and moved that the administrative law judge set a deadline for filing briefs.

On November 21, 2013, I issued an order accepting stipulated record and waiver of hearing and establishing briefing date. Although that order set a December 23, 2013 deadline for receipt of briefs, a subsequent order extended that deadline to January 13, 2013.

I base the following findings of fact and conclusions of law on the parties' stipulation, considered in light of the arguments which counsel raised in their respective briefs.

20 Facts

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The parties stipulated, and I find, that at all material times the Respondent, a corporation with an office and place of business in Monrovia, California, has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Further, based on the parties' stipulation that, during the calendar year ending December 31, 2012, Respondent performed services valued in excess of \$50,000 in states other than California, I conclude that Respondent meets the Board's discretionary standards for the exercise of its jurisdiction.

At all material times, the Respondent has maintained a "Notice to Applicant" document which all applicants, including the Charging Party, have been required to sign before beginning work. The original "Notice to Applicant" is in Spanish. It includes a provision regarding submission of disputes to arbitration. In English translation, that provision states as follows:

I agree to submit to an obligatory arbitration for all disputes and complaints that arise from the submission of this application. Furthermore, if I am hired by this Company, I am in agreement that all disputes or complaints that cannot be resolved within the Company and informally shall be submitted to obligatory arbitration conducted under the Association of Arbitration's rules.

At all material times, Respondent has maintained an employment agreement which includes a provision titled "Agreement for Arbitrating Disputes." The original employment agreement is in Spanish. The following is an English translation of the "Agreement for Arbitrating Disputes" (with capitalization and grammar as rendered by the translator):

AGREEMENT FOR ARBIRTATING DISPUTES. ALL DISPUTES, CONTROVERSIES, OR CLAILMS THAT ARISES FROM, INVOLVES/AFFECTS OR IS IN SOME WAY RELATED TO THE CURRENT AGREEMENT OR IS IN BREACH THAT SAME AGREEMENT, OR IF IT

ARISES FROM, INVOLVES, AFFECTS, OR IS IN SOME WAY RELATED WITH YOUR EMPLOYMENT OR WITH THE CONDITIONS OF YOUR EMPLOYMENT, OR WITH THE TERMINATION OF YOUR EMPLOYMENT, OBLIGATORY AND DEFINITIVE, IN CONFORMITY WITH FEDERAL ARBITRATION LAW, IN AGREEMENT WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, OF THE STATE OF CALIFORNIA. THE ARBITRATOR SHALL HAVE THE RIGHT TO AWARD ATTORNEY FEES AND REASONABLE COST TO THE PREVAILING THE AWARD SHALL BE IN WRITING, SIGNED BY THE ARBITRATOR. AND IT SHALL CARRY THE REASONS FOR THE AWARD. THE ARBITRATOR'S DECISION TO AWARD CAN BE PRESENTED BEFORE ANY COURT WITH JURISDICTION FOR ENFORCEMENT. IN CONFORMITY TO THE PERTINENT LAW, THIS AGREEMENT FOR ARBITRATING DISPUTES WILL NOT PREVENT YOU FROM FILING A CHARGE OR COMPLAINT WITH AN ADMINISTRATIVE GOVERNMENT AGENCY.

On October 11, 2012, the Charging Party, formerly employed by Respondent, filed a class action lawsuit against Respondent in the Superior Court for the State of California, County of Los Angeles. It alleged, among other things, that the Respondent did not provide accurate wage statements and committed other wage and hour violations of the California Labor Code.

On November 19, 2012, Respondent's attorney sent a letter to the lawyer representing the Charging Party in the wage and hour lawsuit.¹ That letter stated, in pertinent part, as follows:

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Because this lawsuit was only recently filed, you may not be aware that Mr. Gamez-Flores signed the enclosed "Notice to Applicant" and "Employment Agreement" on January 27, 2009 and January 29, 2009, respectively (Bates Nos. DEFS-0000 I - DEPS-00002; collectively, the "Agreement"). As stated in the Agreement, Mr. Gamez-Flores has agreed to submit all disputes and claims arising out of his employment to final and binding arbitration under the rules of the American Arbitration Association.

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In *Stolt-Nielsen S.A. v. AnimalFeeds Intl Corp.* (2010) 130 S.Ct. 1758, the U.S. Supreme Court held that where, as here, the arbitration agreement is silent on class arbitration, class arbitration is not permitted. More recently, in *AT & T Mobility v. Concepcion* (2011) 131 S.Ct. 1740, the U.S. Supreme Court held that California's "Discover Bank" rule which purports to prohibit class action waivers in arbitration agreements is preempted by the Federal Arbitration Act.

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Several recent decisions by the California Court of Appeal have concluded That *Stolt-Nielson* and *Concepcion* require individual arbitration of wage and

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The letter from Respondent's attorney frequently, but not always, spelled the Charging Party's name as "Gamez–Flores" rather than "Gomez–Flores," and included a footnote stating that the complaint in the lawsuit "erroneously refers to Plaintiff as Gomez–Flores." However, various documents in the present case, including the stipulation of facts and the complaint, spell the Charging Party's name "Gomez–Flores" and I will follow that practice.

hour claims under arbitration agreements that are indistinguishable from the Agreement signed by Mr. Gomez-Flores. *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506; *Reyes v, Liberman Broadcasting, Inc.* (2012) 2012 Cal.App. LEXIS 945; *Nelson v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115; *Truly Nolen of America v. Superior Court* (20(2) 208 Cal.App.4th 487.

On behalf of the Company, we hereby demand that Mr. Gamez-Flores submit his individual claims alleged in the lawsuit to final and binding arbitration in accordance with the terms of the agreement. Please let us know at your earliest convenience if Mr. Gamez-Flores intends to abide by the agreement. If Mr. Gamez-Flores will not agree to dismiss the lawsuit and pursue his individual claims in arbitration, the Company will promptly move to compel arbitration.

Please let us know if you have any questions regarding our clients' position, or would like to discuss further at this time. Thank you. [Footnote omitted]

Alleged Violations

Complaint Allegations

Complaint paragraph 7 alleges that Respondent violated Section 8(a)(1) of the Act by engaging in certain conduct described in complaint paragraphs 4, 5 and 6. Complaint paragraph 4 states:

At all material times, Respondent has maintained and required applicants to execute a Notice to Applicant, which contains provisions that employees would reasonably conclude preclude them from filing unfair labor practice charges with the Board.

In the stipulation discussed above, Respondent has admitted that at all material times it has maintained and required applicants to execute a notice to applicant, a copy of which is in the record. However, it denies that this document contains provisions that employees would reasonably conclude preclude them from filing unfair labor practice charges with the Board.

Accordingly, I must decide whether the notice to applicant includes provisions which employees reasonably would conclude preclude them from filing charges with the Board, and, if so, whether the Respondent thereby violated Section 8(a)(1) of the Act.

Complaint paragraph 5 states as follows:

At all material times, Respondent has maintained and required applicants to execute an Employment Agreement, which contains a provision titled "Agreement for Arbitrating Disputes" (herein referred to as the "Arbitration Agreement").

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The Respondent has stipulated that at all material times, it maintained an employment agreement containing a provision titled "Agreement for Arbitrating Disputes" and I so find. A copy of this document is included in the stipulated record.

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However, the Respondent has not stipulated that it required applicants to sign the employment agreement or the agreement for arbitrating disputes within it. Respondent's answer "admits that some applicants have executed a document entitled 'Employment Agreement' which includes a provision which requires arbitration of certain employment disputes ("Arbitration Agreement"). Except as admitted herein, Respondent denies each and every remaining allegation set forth therein."

Based on the stipulated record, I cannot conclude that Respondent required job applicants to sign either the employment agreement or the arbitration agreement as a condition of being hired. Respondent's admission that *some* applicants executed the document would be consistent with a conclusion that other applicants did not sign the documents but were hired nonetheless. Similarly, the stipulation leaves open the possibility that Respondent may have hired one or more job applicants who signed the "Employment Agreement" but scratched out the "Arbitration Agreement."

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The parties' stipulation did include a statement of the legal issues which seems to assume that Respondent required all job applicants to sign the arbitration agreement.² The parties' included among the legal issues the question of whether Respondent violated Section 8(a)(1) by "maintaining and requiring applicants to execute an Employment Agreement, which contains a provision titled 'Agreement for Arbitrating Disputes'..."

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However, Respondent's answer denied that it required all job applicants to sign these provisions as a condition of employment and the language of the stipulation does not clearly establish the contrary. In these circumstances, and considering the possibility that a job applicant might have crossed out the arbitration agreement language yet still have been hired, I do not feel comfortable concluding that Respondent invariably required all job applicants to agree to this particular term. I find that at all material times, Respondent asked employees to sign these provisions, but do not find that Respondent denied employment to any applicant who refused to sign or who marked these provisions, by lining or scratching out, to signify that he or she did not agree to them.

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In the "Statement of Issues" section of the stipulated record, the parties agreed that the legal issues to be resolved are whether the Respondent violated Sec. 8(a)(1) of the Act by:

⁽¹⁾ maintaining and requiring applicants to execute a notice to applicant, which contains provisions that employees would reasonably conclude preclude them from filing unfair labor practice charges with the Board;

⁽²⁾ maintaining and requiring applicants to execute an employment agreement, which contains a provision titled "Agreement for Arbitrating Disputes;" and

⁽³⁾ maintaining and enforcing its employment agreement by asserting it in a letter to Charging Party's Attorney Kenneth A. Goldman, Esq., dated November 19, 2012, regarding his wage and hour class action lawsuit and demanding that Charging Party submit his individual claims to arbitration per the employment agreement.

Complaint paragraph 6 states, in pertinent part, as follows:

Since at least November 19, 2012, Respondent has maintained and enforced its Arbitration Agreement described above in paragraph 5 by asserting it in a letter to Kenneth A. Goldman, Esq., Charging Party's attorney in his wage and hour class action lawsuit and demanding that the Charging Party submit his individual claims to arbitration per the Arbitration Agreement described above in paragraph 5

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In its answer, Respondent admitted these allegations. Additionally, the stipulated record includes the November 19, 2012 letter, which is quoted above.

It should be noted that the complaint does not allege that Respondent violated the Act by

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requiring that the Charging Party agree to the arbitration provisions. The Charging Party did so in 2009, which was more than 6 months before he filed the unfair labor practice charge. The 6-month "statute of limitations" in Section 10(b) of the Act would have barred the litigation of such an allegation.

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However, as discussed above, the complaint does allege that Respondent violated the Act by maintaining and enforcing the arbitration agreement requirement. The General Counsel's brief, citing *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F.2d 1568 (3d Cir. 1992) and *The Guard Publishing Co.*, 351 NLRB 1110, 1110, fn.2 (2007), argues, in part, as follows:

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Here, although the arbitration policy as set forth in the Notice to Applicant and Employment Agreement had been promulgated more than six months before the charge was served, Respondent continued to maintain and enforce the arbitration policy into the Section 10(b) period as amply evidenced by Respondent's attempt to enforce it through its November 19, 2012 letter to the Charging Party. As such, the maintenance and enforcement of Respondent's arbitration policy within the Section 10(b) period was unlawful even though the Notice to Applicant and Employment Agreement were promulgated before then.

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In agreement with the General Counsel, I conclude that Section 10(b) does not bar litigation of the allegations raised in complaint paragraphs 4, 5 and 6. *The Guard Publishing Co.*, above; *Fluor Daniel, Inc.*, 333 NLRB 427 (2001).

Analysis

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Complaint Paragraph 4

Complaint paragraph 4 alleges that at all times, Respondent has required job applicants to execute a notice to applicant containing provisions that employees reasonably would conclude preclude them from filing unfair labor practice charges with the Board. The notice to applicant, set forth in full above, includes two sentences, each a separate agreement, which will be discussed individually.

The first sentence agrees to submit to arbitration all disputes arising from the *application process*. However, the notice to applicant includes no limiting language which would make clear that it does not preclude the filing of an unfair labor practice charge. I conclude that someone reading this notice reasonably would conclude that it applied to unfair labor practices such as a refusal to hire or a refusal to consider for hire because of the applicant's union activities or membership. Therefore, I further conclude that it violates Section 8(a)(1) of the Act. See *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. in pertinent part 737 F.3d 344 (5th Cir. 2013).

The second sentence of the notice to applicant amounts to the applicant's promise that, *if hired*, he or she would submit all employment-related disputes to arbitration. If considered in isolation, it also reasonably would lead to the conclusion that it precluded filing of a charge with the Board, but I must consider whether the Respondent has cured the problem through further communication.

This second sentence on the notice to applicant has no immediate effect but only applies to matters that arise after the applicant is hired. However, if an applicant is hired he or she receives another form to sign. This "Agreement for Arbitrating Disputes" includes the following sentence: "IN CONFORMITY TO THE PERTINENT LAW, THIS AGREEMENT FOR ARBITRATING DISPUTES WILL NOT PREVENT YOU FROM FILING A CHARGE OR COMPLAINT WITH AN ADMINISTRATIVE GOVERNMENT AGENCY." (Capitalization in original.)

Arguably, even if the applicant felt precluded from filing an unfair labor practice charge, this disclaimer would assure that such a misimpression would not continue. However, I reject that argument. The disclaimer specifically applies to "this agreement," namely the agreement for arbitrating disputes which the applicant receives when hired. It says nothing about the previous agreement, embodied in the second sentence of the notice to applicant. Someone reading the disclaimer reasonably would conclude that the previous agreement had not been repealed or superseded but remained in effect. Although the agreement for arbitrating disputes did not preclude the filing of an unfair labor practice charge, the agreement in the notice to applicant reasonably would be understood to continue to have that preclusive effect.

Accordingly I recommend that the Board find that Respondent, by the conduct alleged in complaint paragraph 4, violated Section 8(a)(1) of the Act.

Complaint Paragraphs 5 and 6

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Complaint paragraph 5 alleges that, at all material times, Respondent required applicants to sign an employment agreement which included an agreement for arbitrating disputes. For the reasons discussed above, I do not believe that the stipulated facts are sufficient to contradict and overcome the denial in Respondent's answer.

The stipulated facts do support an inference that the Respondent routinely tendered the employment agreement to applicants at the time of hire and thereby created the reasonable impression that agreeing to the agreement for arbitrating disputes was a condition of obtaining employment. However, I stop short of finding that the Respondent denied employment to any applicant who refused to sign, because the stipulated facts do not address such a situation.

Complaint paragraph 6 pertains to a letter which Respondent's counsel sent to the Charging Party's lawyer, who had filed a wage and hour class action lawsuit against Respondent. This letter, set forth above, demanded that the Charging Party submit the wage and hour claims to arbitration, pursuant to the agreement which the Charging Party had signed in 2009 when he began work for Respondent. The complaint alleges that the Respondent "maintained and enforced" the arbitration agreement by sending this letter.

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However, the complaint does not allege that the Respondent took any other action to "maintain and enforce" the agreement to arbitrate. The letter stated that if the Charging Party "will not agree to dismiss the lawsuit and pursue his individual laims in arbitration, the Company will promptly move to compel arbitration." However, the complaint does not allege that Respondent moved to compel arbitration or took any other step, apart from sending the letter, to enforce the agreement to arbitrate.

At the time Charging Party filed the class action wage and hour lawsuit, he no longer was working for Respondent. The complaint does not allege that the Respondent took any employment-related action against the Charging Party for filing the lawsuit. Nonetheless, the General Counsel argues that the Respondent's letter sufficed to violated Section 8(a)(1). The General Counsel's brief states, in part, as follows:

Under the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), specifically applied by the Board to mandatory arbitration agreements in *D. R. Horton*, a Section 8(a)(1) violation will be found where, as in this case, a rule or policy has been applied to restrict the exercise of Section 7 rights. Like the agreement in *D. R. Horton*, the Respondent's arbitration policy as invoked by the [Respondent's counsel's] November 19, 2012 letter, plainly limits Section 7 activity and, as a term or condition of employment, violates Section 8(a)(1).

The General Counsel thus argues that "a rule or policy has been applied to restrict the exercise of Section 7 rights." It is appropriate to ask what Section 7 rights have been restricted, and how?

Without doubt, by "exercise of Section 7 rights," the General Counsel refers to the Charging Party's class action wage and hour lawsuit against Respondent. As will be discussed below, the government contends that this class action lawsuit constitutes concerted activity protected by Section 7. Moreover, the stipulated record reveals no other Section 7 activity.

The General Counsel's brief, quoted above, argues that the Respondent's November 19, 2012 letter invoked an arbitration *policy*. That is not strictly correct. The letter referred to a specific agreement, the one signed by the Charging Party in 2009. The government has not alleged that Respondent acted unlawfully when the Charging Party signed this agreement and, because of Section 10(b), litigation of such an allegation would be barred.

The Respondent did not threaten to take any action against the Charging Party except to respond to the lawsuit by seeking a court order to compel arbitration pursuant to the agreement. Moreover, there is no evidence that the Respondent did even that. In these circumstances, I conclude that Respondent took no action to interfere with, restrain, or coerce an employee in the exercise of Section 7 rights. Therefore, I recommend that the Board dismiss this allegation.

It is possible, of course, that the Board will disagree with this analysis and, if so, further questions must be addressed. Therefore, I include the analysis below. It is my conclusion that Supreme Court decisions, issued after the Board's decision in *D. R. Horton*, relieve that case's rationale of its vitality.

Further Analysis

For clarity, it is appropriate to begin by addressing some rather unusual aspects of this case. At first blush, the Charging Party's status as an employee may seem somewhat attenuated. He filed the lawsuit against Respondent after he stopped working for Respondent and had received his final pay, which was not as much as he believed he was owed. However, under established precedent, he continued to meet the statute's broad definition of employee and remained under the Act's protection. As the Board stated in *Waco, Inc.*, 273 NLRB 746, 747 (1984),

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The fact that these employees were no longer employed by the Respondent does not strip them of their Sec. 7 rights. It is well settled that employees are not protected merely for activity within the scope of their employment relationship, but may engage in other activities for mutual aid or protection. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). The Act provides in Sec. 2(3) that "The term 'employee' shall include any employee, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute. . . ." Thus, we have held that a discharged employee remains a statutory employee entitled to the full protection of the Act. *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977), and cases cited therein.

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Accordingly, I conclude that the Charging Party met the Act's definition of "employee" and was fully entitled to the Act's protection.

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The Charging Party's protected activity also differs from the typical concerted activity often seen in unfair labor practice cases. Apart from cases involving union activity, one familiar form of protected activity involves two or more employees discussing a work-related problem. See, e.g., *Ellison Media Company*, 344 NLRB 1112 (2005)(two employees talking about sexually suggestive comments by a supervisor). Another not uncommon form of protected concerted activity involves an employee voicing the concerns of other employees about terms or conditions of employment. See, e.g., *Five Star Transportation, Inc.*, 349 NLRB 42 (2007)(statements concerning employees' working conditions were protected but statements unrelated to working conditions and disparaging the employer were not).

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In the present case, it is not so intuitive that the Charging Party's activities were concerted. The record does not establish that the Charging Party spoke with any other employee before going to the courthouse and filing the lawsuit. Moreover, although some activities, such as a picket line, have the "flavor" of concerted action, one person filing a lawsuit does not fit within that stereotype. Nonetheless, I conclude that it constituted concerted activity which the statute protects.

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The Charging Party's class action lawsuit concerned an undisputed, and indeed central, term and condition of employment: Wages. Moreover, the pleadings filed by the Charging Party unequivocally identified him as seeking to represent not only himself but an entire class of

Respondent's employees. Such seeking to represent a class of employees was, implicitly, an effort to enlist fellow employees in a common, work-related cause.

Clearly, filing the class action lawsuit constituted protected activity. Board precedent long has established that the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." Such individual action is concerted as long as it is engaged in with the object of initiating or inducing group action. Cibao Meat Products, 338 NLRB 934 (2003); Kvaerner Philadelphia Shipyard, 346 NLRB No. 36 (2006).

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The General Counsel's theory rests on the Board's decision in D. R. Horton, Inc., above, which, as the Board observed, involved an issue of first impression, whether an employer violates the Act by requiring an employee to sign an agreement which waives the right to bring claims against the employer in a court and also waives bringing class action claims before an arbitrator. The General Counsel's brief states:

In D.R. Horton, the Board held that a policy or agreement that is imposed as a condition of employment and that precludes employees from pursuing employment-related collective claims in any court or arbitral forum unlawfully

restricts employees' Section 7 right to engage in protected concerted activity. Such policies, therefore, violate Section 8(a)(1) of the Act. Just as in D.R. Horton, Respondent's arbitration program violates Section 8(a)(1) of the Act because it prohibits collective dispute resolution in any forum. As is true with any other protected concerted activity, Respondent may not require that

employees waive their right to participate in such collective action.

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In D. R. Horton, an employer required all employees, as a condition of employment, to sign an agreement which waived "the right to file a lawsuit or other civil proceeding relating to Employee's employment" and which also provided that all employment-related disputes (with certain exceptions the Board did not deem pertinent) would be decided by an arbitrator who only could hear individual claims. The agreement specifically provided that the arbitrator did not have authority to "fashion a proceeding as a class or collective action" and did not have authority "to award relief to a group or class of employees in one arbitration proceeding. . ."

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The Board found that D. R. Horton's arbitration agreement requirement interfered with employees' statutory right to engage in concerted activities for their "mutual aid or protection." In reaching this conclusion, the Board relied on previous cases in which it had found that employees were engaged in protected concerted activity when they filed lawsuits against their employers on employment-related matters. See, e.g., Trinity Trucking & Materials Corp., 221 NLRB 364, (1975), citing Leviton Manufacturing Co., 203 NLRB 309 (1973) for the "applicable principle that the filing of the civil action by a group of employees is protected activity unless done with malice or in bad faith." See also Le Madri Restaurant, 331 NLRB 269, 275 (2000).

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In D. R. Horton, an attorney had notified the respondent employer that his law firm had been retained to represent a particular employee "and a nationwide class of similarly situated" employees in a lawsuit under the federal wage and hour law. For reasons discussed above, the Board deemed that the Charging Party had engaged in "concerted activities" when he filed the class action lawsuit on behalf of other employees as well as himself. The Board cited Meyers Industries, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), for the principle that "concerted activity includes conduct by a single employee if he or she 'seek[s] to initiate or to induce or to prepare for group action." The Board further stated:

Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.

357 NLRB No. 184, slip op. at 3.

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The Board thus concluded that the Act protected, among other things, an employee's filing of a class action lawsuit. The Board further found that the respondent's arbitration agreement, which employees had to sign as a condition of employment, prevented employees from engaging in this particular form of protected, concerted activity. By signing the agreement, employees waived the right to go to court and therefore could not engage in the concerted activity implicit in a class action lawsuit. The arbitration agreement also prevented the arbitrator from hearing a class action grievance or issuing an award granting relief to a class of employees.

The remaining logical steps in the *D. R. Horton* decision can be described concisely in a syllogism. The first premise of that syllogism flows from the Board's conclusion that D. R. Horton, by requiring employees to sign its arbitration agreement, prevented them from engaging in the protected concerted activity of filing a class action lawsuit in either a judicial or arbitral forum.

The second premise of the syllogism is simply that Section 8(a)(1) of the Act makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. 29 U.S.C. § 158(a)(1). The syllogism thus reasons as follows:

(A) D. R. Horton prevented employees from exercising a right under the Act by requiring them to sign the arbitration agreement. (B) It is unlawful for an employer to interfere with the exercise of a right guaranteed by the Act. Therefore: Requiring employees to sign the arbitration agreement was unlawful.

If the National Labor Relations Act were the only star in the universe, this conclusion would meet no challenge. However, the Act lives in the United States Code, a galaxy of statutes, another of them being the Federal Arbitration Act (FAA). The FAA provides, in part, as follows:

A written provision in any. . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The *D. R. Horton* opinion noted that where a possible conflict exists between the National Labor Relations Act and the FAA,

The Board is required, when possible, to undertake a "careful accommodation" of

the two statutes. *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). That does not mean, of course, that the Act must automatically yield to the FAA or the other way around. Instead, when two federal statutes "are capable of coexistence," both should be given effect "absent a clearly expressed congressional intention to the contrary." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

357 NLRB No. 184, slip op. at 8.

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After an extensive analysis, the Board concluded that the FAA did not stand in the way of finding that D. R. Horton committed an unfair labor practice when it required employees to sign the arbitration agreement or ordering that the violation be remedied. The Board discussed and distinguished Supreme Court opinions regarding the application of the FAA, and it stressed the limited nature of its holding:

We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis.

357 NLRB No. 184, slip op. at 12.

The United States Court of Appeals for the Fifth Circuit disagreed with the Board's conclusion and denied enforcement of this portion of the Board's decision. *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). However, as the General Counsel's brief correctly points out, "it is well settled that the Board's administrative law judges are required to follow established Board precedent that the Supreme Court has not reversed. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979)." (General Counsel's brief at page 11.)

Both the Board's decision in D. R. Horton and the Charging Party's brief in the present case liken an agreement which requires arbitration on an individual-only basis to a "yellow dog contract." Indeed, the Charging Party's brief calls such pacts "classic 'yellow dog' agreements that constitute an unenforceable interference with Section 7 rights and the Board's mandate to protect such rights."

To those specializing in labor law and familiar with its history, the reference to "yellow dog contracts" carries a meaning laden with significance and even emotion. A century ago, some employers required each worker to sign an agreement promising not to become or remain a union member.

A number of states outlawed these "yellow dog contracts." For example, Kansas made it a misdemeanor for an employer to require an employee to sign such a contract. However, the United States Supreme Court held the Kansas law to be unconstitutional: "A state cannot, by designating as 'coercion' conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty, for to permit this would deprive the Fourteenth Amendment of its

effective force in this respect." Coppage v. Kansas, 236 U.S. 1, 2 (1915).

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Needless to say, federal law on this point has changed, but the term "yellow dog contract" continues to signify a written waiver of federal rights which an applicant or employee must sign to obtain a job or keep it. When such an agreement requires the relinquishment of Section 7 rights, it is repugnant to the Act. Statutory rights would turn into mere toothless wishes if employers could insist that an applicant or employee forfeit them.

Respondent's "Agreement to Arbitrate Disputes" deprives employees not of the right to join a union but of the right to act in concert with other employees to challenge a term or condition of employment either in court of before an arbitrator.³ An employee who signs this agreement waives his right to take his dispute with the employer to court, thereby precluding not just individual action in that forum but also concerted activity on behalf of other employees, through a class action lawsuit. Instead, the employee must take the dispute to an arbitrator, but can appear before the arbitrator only individually, and not as part of a class of employees.

If one accepts the conclusion that an employee filing a class action lawsuit on behalf of other employees is engaging in activity protected by the Act, then an agreement waiving this right, and also precluding a class action before an arbitrator, clearly would be a form of "yellow dog contract." It requires, as a condition of employment, the relinquishment of Section 7 rights recognized in Board precedent. However, to say that the Act protects an employee's right to file a class action lawsuit does not address how much weight a court might accord this form of protected activity when it strikes a balance between the Act and the FAA.

The Board's decision in *D. R. Horton* seeks to undo the limiting effect of the arbitration agreement and thereby protect the Section 7 right of employees to engage in concerted action in either an arbitral or judicial forum. However, after the Board decided *D. R. Horton*, the Supreme Court issued opinions which erode the foundation on which *D. R. Horton* is based.

The *D. R. Horton* decision issued on January 3, 2012. One week later, the Supreme Court issued its opinion in *CompuCredit Corp. v. Greenwood*, ___ U.S. ___, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012). That case focused on a potential clash between the FAA's strong proarbitration policy and some language in the Credit Repair Organization Act (CROA), which required certain companies to place a "disclosure statement" in contracts with their customers. One part of the disclosure statement informed customers "You have the right to sue a credit repair organization that violates the Credit Repair Organization Act." Another provision stated, "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." Still another stated that "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person."

Based on this language, lower courts concluded that Congress did not intend the FAA's proarbitration policy to apply to disputes arising under the CROA. The Supreme Court disagreed,

Unlike the arbitration agreement in the *D. R. Horton* case, which specifically precluded class arbitrations, the language of the arbitration agreement at issue here includes no such prohibition. However, the Respondent takes the position that recent court decisions, cited in the November 19, 2012 letter of Respondent's counsel, have that effect.

concluding that these provisions were insufficient to overcome an arbitration clause in the contract customers signed. The "right to sue" did not necessarily mean a right to bring an action in court but also could refer to a proceeding before an arbitrator.

The Court compared the CROA's requirements with more specific language in certain other statutes. It quoted provisions which were quite specific about the right to sue in District Court but still had been insufficient to defeat the FAA's general proarbitration policy. For example, the Court noted that a provision of the Racketeer Influenced and Corrupt Organizations Act stated that a person injured by certain violations "may sue therefor *in any appropriate United States district court*..." 18 U.S.C. § 1964(c)(italics added). Similarly, the Court cited a section of the Clayton Act which provided that an injured party "may sue therefor *in any district court of the United States*..." 15 U.S.C. § 15(a)(italics added). Notwithstanding these quite specific references to suing in district court, the language was not strong enough to override a contractual agreement to arbitrate

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Although these statutes indeed created causes of action, and even though they referred to lawsuits in "district court," that language did not guarantee litigation before a federal judge. Parties could still enter into a contract providing for submission of the dispute to an arbitrator, and such contractual language would be binding.

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To render an agreement to arbitrate unenforceable, the Supreme Court required that the statutory language go beyond a reference to a lawsuit in court. Rather, the statute must manifest a "Congressional command" that the FAA would not apply. With only slight exaggeration, I gather that to convey such a "command," a statute must speak very specifically, best ending with "that's an order, mister," in a raised voice.

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The Supreme Court issued its *CompuCredit Corp*. opinion a week after the Board's *D. R. Horton* decision, but *CompuCredit* was not the Court's last word on the subject. Almost a year and a half later, the Court decided *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ____, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013). For the reasons discussed below, I conclude that, as a result of the *American Express Co.* holding, the Board's *D. R. Horton* rationale no longer remains viable.

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In *American Express Co.*, the Supreme Court forcefully applied the principle, articulated in earlier decisions, that courts must "rigorously enforce" arbitration agreements according to their terms. It further stressed that courts remain obligated to enforce an arbitration agreement even if the dispute concerns the alleged violation of a federal statute.

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The Court noted one narrow exception to the principle that an arbitration agreement must be enforced. That exception arises when the FAA's arbitration mandate has been "overridden by a contrary congressional command." *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. at 2309. The word "command" again suggests that Congress must express clearly and unmistakably its intent to override the FAA's mandate. Leaving no doubt, the Court cited its previous *CompuCredit Corp.* decision.

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As discussed above, the *CompuCredit Corp*. opinion pointed out that even a specific statutory authorization to bring suit in "district court" did not neutralize the parties' agreement to submit a dispute to arbitration and courts remained obligated to enforce that arbitration agreement.

Thus, even when the law itself referred to litigation in district court, that language did not rise to the level of a "congressional command" contradicting the FAA's mandate.

The National Labor Relations Act does not include any language resembling a "congressional command" to lift the FAA's arbitration mandate. Therefore, I must conclude that the strong government policy favoring arbitration applies here. That conclusion is consistent with the Supreme Court's decision in an earlier case, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

In *Gilmer*, the Supreme Court considered whether an arbitration agreement should be honored in a dispute arising under the federal Age Discrimination in Employment Act (ADEA). Taking into account that the FAA "manifests a liberal federal policy favoring arbitration" and that neither the text nor the legislative history of the ADEA precluded arbitration, the Court found that the agreement to arbitrate was binding.

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Although the Equal Employment Opportunity Commission plays a significant role in the enforcement of the ADEA, the Court held that the mere involvement of an administrative agency in the enforcement scheme was not sufficient to preclude arbitration. The Court cautioned that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 26, citing *Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

In *Gilmer*, the Court also noted that "the ADEA is designed not only to address individual grievances, but also to further important social policies." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 27, citing *EEOC v. Wyoming*, 460 U.S. 226, 460 U.S. 231 (1983). However, the Court did not perceive any inconsistency between these policies and the FAA policy favoring arbitration. It appears especially relevant here that the Court, as noted above, held that "an administrative agency's mere involvement in a statute's enforcement is insufficient to preclude arbitration." Id. at 21.

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One other aspect of *Gilmer* also warrants mention. In its recent *American Express Co.* decision, the Supreme Court observed that, in *Gilmer*, "we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct, at 2311.

The *D. R. Horton* decision sought to distinguish *Gilmer* by stressing that the arbitration agreement in *Gilmer* "contained no language specifically waiving class or collective claims." However, the arbitration agreement need not specify such an exclusion. As the *D. R. Horton* decision itself noted, in *Stolt-Nielsen S. A. v. Animal Feeds International Corp.*, 559 U. S. 662 (2010), the Court held that imposing class arbitration on parties who had not agreed to authorize class arbitration was inconsistent with the Federal Arbitration Act. Therefore, an arbitration agreement which says nothing about class action implicitly excludes it.

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The Board also stated in *D. R. Horton*: "Gilmer addresses neither Section 7 nor the validity of a class action waiver. The claim in *Gilmer* was an individual one, not a class or collective claim, and the arbitration agreement contained no language specifically waiving class or collective claims." 357 NLRB No. 184, slip op at 9–10.

In its recent *American Express Co.* decision, the Supreme Court went beyond its requirement that a party must specifically agree to class arbitration. The Court questioned whether the concepts of arbitration and "class action" were even compatible:

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Truth to tell, our decision in *AT&T Mobility [LLC v. Concepcion*, 563 U.S. ____, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)] all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law "interfere[d] with fundamental attributes of arbitration." 563 U.S., at ____ (slip op., at 9). "[T]he switch from bilateral to class arbitration," we said, "sacrifices the principal advantage of arbitration-its informality-and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." Id., at ____ (slip op., at 14). We specifically rejected the argument that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system." Id., at ____ (slip op., at 17).

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Id. at 2312. The Court's skepticism about the compatibility of arbitration and class action, and its opinion that combining the two was "more likely to generate procedural morass than final judgment," certainly suggest that should the Court balance the Section 7 right to engage in a class action arbitration and the FAA policy, class action arbitration would receive little weight.

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It bears repeating that, in *D. R. Horton*, the Board stressed that it was *not* mandating class arbitration. "Rather, we hold only that employers may not compel employees to waive their NLRB right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration." 357 NLRB No. 184, slip op. at 12.

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However, in view of its previous decisions, the Court might well conclude that the Board was affording only a Hobson's choice. A requirement to leave open a judicial forum neuters the effect of most arbitration agreements, and thus conflicts with the FAA's mandate. The alternative, to find unlawful all arbitration agreements except those specifically authorizing class action, would impose a form of arbitration which the Supreme Court considers likely to create a procedural morass. More than that, it would collide head-on with the strong FAA policy favoring arbitration.

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The Supreme Court's recent decision in *American Express Co.*, considered in the context of its earlier opinions concerning the Federal Arbitration Act, leaves no doubt; the FAA policy would prevail. When all the recent Supreme Court decisions interlock, they create a space in which the *D. R. Horton* rationale has no oxygen.

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One other matter should be included in this analysis because it may shed light on the tension between the policies embodied in the National Labor Relations Act and the mandate of the Federal Arbitration Act, as articulated in the Supreme Court's decisions discussed above. Those decisions do not treat an agreement to arbitrate as any different from other contracts, but focus instead on when a federal court should be allowed to upset or modify its terms. The answer: Very rarely.

However, the agreement to arbitrate in this case, as in many other cases, was not the result of negotiations between two parties of roughly equal bargaining power. Rather, it was a "contract of adhesion" which an individual had to sign as a condition of obtaining or keeping employment. This kind of lopsided situation, in which a strong party can dictate and impose terms unilaterally, concerned Congress when it passed the National Labor Relations Act. Thus, it included the following in the Act's preamble:

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The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

29 U.S.C. § 151. When Congress considered passage of the National Labor Relations Act, its sponsor, Sen. Robert Wagner, gave a similar explanation on the Senate floor:

Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, [the employee] can attain freedom and dignity only by cooperation with [other employees].

Morris, *The Developing Labor Law, 5th Edition*, at page 28, citing 79 Cong. Rec. 7565 (1935). Thus, concern about an employee's "actual liberty of contract" resides, as it were, in the Act's DNA. The Act itself creates a mechanism, collective bargaining, which employees can use to enhance their economic strength, but which also protects their right to choose whether or not to take this step.

Indeed, the Act seems to inoculate its practitioners with these values, producing distinctive antibodies. Any contract of adhesion seems antithetical to the world the Act's drafters contemplated: Parties of equal dignity working out their differences through the give and take of negotiations. However, whatever be labor lawyers' antibodies and allergies, they must yield to court precedent.

The Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant*, above, involved a dispute between the credit card company and merchants that accepted the credit cards. The merchants filed a class action lawsuit alleging that the credit card company had violated federal antitrust laws.

The merchants went to court even though each had entered into an arbitration agreement which purported to waive the right to a judicial forum and to require arbitration individually. The merchants decided to act concertedly, bringing a class action lawsuit, because they could not afford to act individually.

Pressing an antitrust claim against the credit card company typically would require retaining an economist to prepare an expert analysis, costing hundreds of thousands of dollars and possibly more than a million dollars. An individual merchant lacked the economic wherewithal to bear this burden alone.

The credit card company moved to dismiss the class action lawsuit, asserting that each merchant had signed an agreement to arbitrate, and to arbitrate only on an individual basis. The federal district court granted the motion and dismissed the lawsuit. However, the Court of Appeals for the Second Circuit reversed. It reasoned that because of the prohibitive costs the merchants would face if they had to arbitrate the claims, their class-action waivers were unenforceable and arbitration could not proceed.

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Reversing the Court of Appeals, the Supreme Court held that the Federal Arbitration Act did not permit courts to invalidate a contractual waiver of class arbitration on the ground that each plaintiff's cost of arbitrating a federal statutory claim individual would exceed the potential recovery.

The Supreme Court rejected the merchants' argument that enforcing their waivers of class arbitration barred effective vindication of their statutory rights. The Court held that the fact that it would not be worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy. *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. at 2311.

In a dissent joined by Justice Ginsburg and Justice Breyer, Justice Kagan wrote:

Throughout, the majority disregards our decisions' central tenet: An arbitration clause may not thwart federal law, irrespective of exactly how it does so. Because the Court today prevents the effective vindication of federal statutory rights, I respectfully dissent.

Id. 133 S.Ct. at 2313. Although the Court's majority opinion took issue with portions of the dissent, and certainly did not concede that the decision "prevents the effective vindication of federal statutory rights," it still left no doubt that, absent a clear congressional order to the contrary, the duty to follow the terms of the arbitration agreement trumps other concerns:

[C]ourts must "rigorously enforce" arbitration agreements according to their terms, *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985), including terms that "specify with whom [the parties] choose to arbitrate their disputes," *Stolt-Nielsen*, supra, at 683, and "the rules under which that arbitration will be conducted," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been "overridden by a contrary congressional command." *CompuCredit Corp. v. Greenwood*, 565 U.S. _____, ___ (2012) (slip op., at 2-3) (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

Id., 133 S.Ct. 2310. As discussed above, the Court will find a "contrary congressional command" only when Congress has spoken in the clearest of terms. Congress has not done so with respect to the National Labor Relations Act.

In assessing how the *American Express Co.* decision will affect the viability of *D. R. Horton*, differences in the two cases should be taken into account. They decided different issues. The *American Express Co.* case focused on the effect of an agreement to arbitrate, not on the lawfulness of requiring someone to sign such an agreement. Moreover, different statutes would govern whether it would be lawful for a credit card company to require merchants to sign arbitration agreements and whether it would be lawful for employers to require employees to do so as a condition of employment.

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Nonetheless, the *American Express Co.* decision reflects a strong public policy in favor of arbitration, and in light of this muscular policy, it seems quite unlikely that the Court would hold it unlawful for an employer to condition employment on the employee's signing an arbitration agreement. Moreover, the Court's decision in *American Express Co.* should be read in conjunction with its other opinions concerning the Federal Arbitration Act, including *Gilmer v. Interstate/Johnson Lane Corp.*, above.

The *Gilmer* decision and other Supreme Court precedent discussed by the Board in *D. R. Horton* did not shut the door on the *D. R. Horton* rationale. However, because of the two Supreme Court decisions which issued after *D. R. Horton*, that door no longer is ajar.

REMEDY

The Respondent's Notice to Applicant violates Section 8(a)(1) of the Act because a reader reasonably could conclude that the obligatory arbitration agreement in it restricted access to the Board or barred the filing of unfair labor practice charges. To remedy this violation, I recommend that the Board order the Respondent either to remove the arbitration agreement from the Notice to Applicant or else clarify it by adding explicit language informing applicants that they retained the right to contact the Board and to file unfair labor practice charges. Additionally, the Respondent should be required to provide copies of the revised notice to all employees or notify them that the obligatory arbitration agreement has been rescinded.

The Respondent also should be required to post the Notice to Employees attached to this decision as Exhibit A.

Conclusions of Law

- 1. The Respondent, Haynes Building Services, LLP, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 40 2. The Respondent, at all material times here, has violated Section 8(a)(1) of the Act by maintaining an obligatory arbitration provision in a document given to and signed by job applicants, which they reasonably could believe bars access to or restricts their right to file charges with the National Labor Relations Board.
 - 3. The Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue

the following recommended⁵

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ORDER

The Respondent, Haynes Building Services, LLP, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

- 10 (a) Maintaining an obligatory arbitration agreement which employees reasonably could believe bars access to or restricts their right to file charges with the National Labor Relations Board.
- (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act:
 - (a) Within 14 days after service by the Region, post at its facilities in Monrovia, California, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, noticed shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010). In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 28, 2012. *Excel Container, Inc.*, 325 NLRB 17 (1997).
 - (b) Rescind the obligatory arbitration agreement in its notice to applicants or else revise it to make clear that it does not restrict or bar employees from contacting the National Labor Relations Board or from filing unfair labor practice charges.

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading
"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED
PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN
ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

	(c) Notify each of its employees in writing that the obligatory arbitration agreement has been rescinded or revised and, if it has been revised, provide each of its employees a copy of the revised agreement.
5	(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.
10	Dated Washington, D.C. February 7, 2014
15	Keltner W. Locke Administrative Law Judge

HAVNES BIHI DING SERVICES LLD

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT maintain an obligatory arbitration agreement that you reasonably could believe bars or restricts your right to file charges with the National Labor Relations Board.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind or revise the obligatory arbitration agreement to make it clear the agreement does not in any manner bar or restrict your right to contact or file charges with the National Labor Relations Board.

WE WILL provide to you copies of the revised agreement or notify you in writing that we have rescinded the agreement.

		11111	(Employer)	
Dated:	By:			
	`	(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.